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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1930.

No. [redacted] 79

CHICAGO & EASTERN ILLINOIS R. R. CO.,
Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS and JOE THOMAS,
Respondents.

Answer to Petition for Writ of Certiorari.

MORRIS K. LEVINSON, and
SAMUEL E. HIRSCH,
Counsel for Respondents.

CHICAGO LAW PRINTING CO., 101 S. WELLS ST. FRANKLIN 6521

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1930.

No. 959

CHICAGO & EASTERN ILLINOIS R. R. CO.,
Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS
and JOE THOMAS,
Respondents.

Answer to Petition for Writ of Certiorari.

STATEMENT.

MAY IT PLEASE THE COURT:

The statement of facts set out in petitioner's brief is so wholly incorrect, that we are constrained to submit the following:

Joe Thomas, the respondent and claimant below, is an illiterate colored man. He was a laborer whose duties consisted of hoisting coal, taking care of the coal chute, the roundhouse and cinder pit (Rec. 18), using the broom for cleaning up (Rec. 20), and to sweep and clean up the office (Rec. 36).

At the immediate time claimant got hurt, he was preparing to hoist coal from a bin down on the ground up into a coal chute near a roundhouse (Rec. 41). The coal evidently was lifted by means of a stationary electric motor. Thomas was oiling the motor and his arm became entangled in the gears (Rec. 14). Long after the coal got into the chute it would be dumped from overhead down into locomotive engines in the roundhouse.

When coal was later dumped into the locomotive engines, the engines were "dead," that is engines that had finished hauling freight cars and engines that were placed in the roundhouse at the end of their runs, for the purpose of being coaled and watered (Rec. 34).

Thus Thomas testifies at (Rec. 30), that the engines that he worked on are disconnected from the trains and have been pulled off the cars. At (Rec. 34), he testifies that the engines do not bring any freight into the roundhouse where he is working; that he has never seen any of these engines haul any freight (Rec. 29). At (Rec. 20) Thomas swears that "small" switch engines came into the roundhouse where he worked; that he would water and coal those engines once a day from 2:30 to 3:30 o'clock in the morning, after they came in from a run. From 3:30 to 6:00 o'clock A. M., they would go out on runs; that he had nothing to do with freight and that these particular little engines would only run around Chicago.

As to the one large engine, Thomas says that when it comes into the roundhouse, it has no freight (Rec. 31).

Thus also in the testimony of Lottinville (Rec. 47), a witness for the railroad company, it appears that the engines which are coaled by Thomas are dead engines. He says that when the switch engines come in, they are not bound for any purpose, except to be watered and coaled. And the witness refuses to say that those engines in the roundhouse are engines that run between different states of the Union (Rec. 48).

He also says (Rec. 49), that the engines, that come into the roundhouse, come in there light, that is, no freight at all, and when they go out, they have no freight and go out light also. These engines are designated as switch engines and only run a quarter of a mile and not over two miles and a quarter, except that one engine may run probably eleven miles. The witness for the railroad company makes it plain that as to engines classified for different industries, that the respective crews would coal their own engines. And (Rec. 53), the witness agrees with Thomas that the engines in the roundhouse are "dead" engines, after they are through with their runs.

A fair analysis of Thomas' testimony, as well as the testimony of the witnesses for the railroad company, makes it plain that he was a laborer, whose chief duties were to sweep up the roundhouse, and clean the office, and to put coal and water in four switch engines that were always dead when they were in the roundhouse. Necessarily, they had to be "dead," in the roundhouse, where Thomas operated his motor, because all the witnesses unite in saying that the roundhouse is no place for freight. The coaling operation, all the witnesses agree, took place at about 2:30 o'clock in the morning.

But it strikes us that all this testimony is immaterial, as the question is, not whether these engines might or might not later engage in interstate commerce, but had the work that claimant was doing at the time he got hurt any direct connection with interstate traffic. He was merely preparing to lift coal from a storage bin located near a roundhouse into a coal chute, at the time he was injured. Claimant swears that the coal later would be put into engines engaged in switching operations in and around Chicago. But when the coal would be put into the locomotive engines, they were "dead" engines. They might stand "dead" for days in the roundhouse.

Thomas never coaled engines that were in actual traffic nor had he anything to do with keeping engines running on the highway.

With respect to the citations presented by opposing counsel, it is enough to say that in each of those cases the workman was directly engaged in labor which furthered interstate commerce; that is to say, either on the tracks constituting an interstate highway or directly connected therewith. In the case at bar, it is evident that the work being done had nothing to do with the maintenance or operation of the interstate highway or interstate traffic and that the work was done in or near a roundhouse for the benefit of dead engines.

BRIEF.

I.

Respondent being engaged at the time of his injury, in hoisting coal in a roundhouse, from a bin to a coal chute, was not engaged in interstate commerce.

Shanks v. *Delaware R. R. Co.*, 239 U. S. 556.
Minneapolis and St. L. R. R. Co., v. *Winters*, 242 U. S. 353.
Delaware R. R. Co. v. *Yurkonis*, 238 U. S. 439.
C. B. & Q. R. R. Co. v. *Harrington*, 241 U. S. 177.
Kelly v. *Pennsylvania R. R. Co.*, 238 Fed. 95.

II.

The burden of proof is on the railroad company to prove that the employee was engaged in interstate commerce.

Payne v. *Industrial Com.*, 296 Ill. 223.
Goldsmith v. *Payne*, 300 Ill. 119.

ARGUMENT.

I.

We submit that an analysis of all the testimony in the record shows that Joe Thomas, the respondent, was not engaged in any such work, the immediate connection of which was to connect his work with interstate commerce.

A full exposition of the law, setting forth the distinction between such work as might be held closely connected with interstate commerce, and such as might not, is set forth in *Shanks* v. *Delaware R. R. Co.* 239 U. S. 556.

In that case a workman engaged in repairing or altering the location of a fixture in a machine shop, was injured. Says the Court at page 258 of the opinion:

> "The connection between the fixture and interstate transportation was remote, at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation."

So also in the case of *Erie R. R. Co.* v. *Collins*, 259 Fed. 172, at page 175, the Court says:

> "Coal 'ceases to be in such (interstate) commerce when it reaches its destination, and is left on the storage tracks for some time, as in the *Harrington* case.' (*Harrington* v. *C. B. & Q.*, 241 U. S. 177). 'Then the coal being out of interstate commerce does not again get into interstate commerce by the mere act of being moved from the storage tracks to another place on the tracks in front of the coal chutes. That was the act Harrington performed."

Again, in *Minneapolis and St. L. R. R. Co.* v. *Winters*, 242 U. S. 353, 356, the Court says:

> "An engine as such is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. * * * It simply had finished some interstate work and had not yet begun upon any other. Its next work, so far as appears, might be interstate, or confined to Iowa, as it should happen. At the moment, it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities, or upon accidental later events."

We also wish to call the Court's attention to the cases of *Delaware R. R. Co.* v. *Yurkonis*, 238 U. S. 439; *C. B. & Q. R. R. Co.* v. *Harrington*, 241 U. S. 177, and *Kelly* v. *Pennsylvania R. R. Co.*, 238 Fed. 95, which are illustrative of the distinction made by the Courts, and uphold claimant's contention herein, that he was not engaged in interstate commerce.

II.

It appears from the testimony of Lottinville, a witness for respondent Railroad Company, that there was only one engine in the roundhouse on the day that Thomas was injured and that it was a "dead" engine; that it had just laid off and was doing nothing. (Abst. 17; Rec. 78.)

Thomas says that at the time he got hurt, he was getting ready to hoist coal from a storage bin down on the ground up into the chute. (Abst. 9; Rec. 41.) No witness disputes that and no witness points out or can point out that that particular coal was later put into an engine that still later might or might not be engaged in interstate commerce. That is the state of the record and upon which opposing counsel say there cannot be the slightest question but that claimant was engaged in interstate commerce at the time he sustained his injury.

III.

It is also well settled that the burden of proof is on the railroad company to prove that its employee was engaged in interstate commerce. Petitioner has not only failed to sustain that burden, but, the evidence, in our opinion, is indubitably the other way.

Payne v. *Industrial Com.*, 292 Ill. 223.
Goldsmith v. *Payne*, 300 Ill. 119.

CONCLUSION.

The Supreme Court of Illinois, the Circuit Court of Cook County, Illinois, and the Industrial Commission, all having held that the respondent herein came within the purview of the Illinois Compensation Act, and, we submit, all the evidence showing that respondent was not engaged in interstate commerce, we respectfully submit that under Rule 38 of this Court the petition for certiorari herein should be denied.

Respectfully submitted,

MORRIS K. LEVINSON, and
SAMUEL E. HIRSCH,
Counsel for Respondent.

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OCTOBER TERM, A. D. 1931.

No. 79

CHICAGO & EASTERN ILLINOIS R. R. CO.,
Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS and JOE THOMAS,
Respondents.

BRIEF AND ARGUMENT FOR RESPONDENTS.

MORRIS K. LEVINSON, and
SAMUEL E. HIRSCH,
Counsel for Respondents.

CHICAGO LAW PRINTING CO., 101 S. WELLS ST. FRANKLIN 6521

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No. 79

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vs.

INDUSTRIAL COMMISSION OF ILLINOIS and JOE THOMAS,
Respondents.

BRIEF AND ARGUMENT FOR RESPONDENTS.

STATEMENT.

The statement of facts set out in petitioner's brief is so wholly incorrect, that we are constrained to submit the following:

Joe Thomas, the respondent and claimant below, was an illiterate colored man, who was at the time of the injury in question a laborer employed by petitioner. His duties consisted of sweeping and cleaning up the office (Rec. 36), and part of the time he was engaged in running a motor which was used to lift coal from the ground into a coal chute near a roundhouse. (Rec. 18.)

At the immediate time claimant was hurt, he was preparing to hoist coal from a bin on the ground into a coal chute near the roundhouse in question. (Rec. 22.) The coal was lifted by means of a stationary electric motor. Claimant was oiling the motor, and his arm became entangled in the gears. (Rec. 14.) No coal had been lifted by him on the day he was hurt. He had merely started the motor when hurt.

The uncontradicted testimony is that long after the coal was lifted from the bin into the coal chute, the coal would be dumped into locomotive engines in the roundhouse, either by claimant or other employees of petitioner, but when such coal was dumped into the engines, the engines were "dead," that is engines that had finished switching freight cars and were in the roundhouse at the end of their respective runs.

Thus Thomas testified at (Rec. 34), that the engines that he worked on are disconnected from the trains and had been pulled off the cars. He testifies that the engines do not bring any freight into the roundhouse where he is working; that he has never seen any of these engines haul any freight. (Rec. 29.) At (Rec. 19, 20) Thomas swears that "small" switch engines came into the roundhouse where he worked; that he would water and coal these engines once a day from 2:30 to 3:30 o'clock in the morning, after they came in from a run. From 3.30 to 6 o'clock A. M., they would go out on runs; that he had nothing to do with freight and that these particular little engines would only run around Chicago and were switch engines and evidently not engaged in interstate hauls.

Thus also in the testimony of Lottinville (Rec. 47), a witness for the railroad company, it appears that the engines which are coaled by Thomas are "dead" engines.

He says that when the switch engines come in, they are not bound for any purpose, except to be watered and coaled. And the witness refuses to say that those engines in the roundhouse are engines that run between different states of the Union. (Rec. 48.) He also says (Rec. 49), that the engines, that come into the roundhouse, come in there "light," that is, no freight at all, and when they go out, they have no freight and go out "light" also. These engines are designated as switch engines and only run a quarter of a mile and not over two miles and a quarter, except that one engine may run probably eleven miles. The witness for the railroad company makes it plain that as to engines classified for different industries, that the respective crews would coal their own engines. And (Rec. 53), the witness agrees with Thomas that the engines in the roundhouse are "dead" engines, after they are through with their runs.

A fair analysis of Thomas' testimony, as well as the testimony of the witnesses for the railroad company, makes it plain that he was a laborer, whose chief duties were to sweep up the roundhouse, and clean the office, and to put coal and water in four switch engines that were always dead when they were in the roundhouse. Necessarily, they had to be "dead," in the roundhouse, where Thomas operated his motor, because all the witnesses unite in saying that the roundhouse is no place for freight. The coaling operation, all the witnesses agree, took place at about 2:30 o'clock in the morning.

No witness says that any of the switch engines in question actually crossed the Illinois state line, and all of the evidence is to the effect that the claimant never coaled engines that were in actual traffic or had he anything to do with keeping engines running on the interstate highway.

SUMMARY OF POINTS PRESENTED AND AUTHORITIES.

I.

Respondent being engaged at the time of his injury, in oiling a motor to be used for hoisting coal from a bin to a coal chute, was not engaged in interstate commerce.

Shanks v. *Delaware R. R. Co.*, 239 U. S. 556.
Minneapolis and St. L. R. R. Co. v. *Winters*, 242 U. S. 353.
Delaware R. R. Co. v. *Yurkonis*, 238 U. S. 439.
C. B. & Q. R. R. Co. v. *Harrington*, 241 U. S. 177.
Kelly v. *Pennsylvania R. R. Co.*, 238 Fed. 95.

II.

Unless the employe was actually engaged, at the time of the injury, in working with or using an instrumentality, which was then being used in interstate commerce, the Federal statute does not apply.

Shanks v. *Delaware R. R. Co.*, 239 U. S. 556.
Minneapolis and St. L. R. R. Co. v. *Winters*, 242 U. S. 353.
Delaware R. R. Co. v. *Yurkonis*, 238 U. S. 439.

III.

The burden of proof is on the railroad company to prove that the employe was engaged in interstate commerce.

Payne v. *Industrial Com.*, 296 Ill. 223.
Goldsmith v. *Payne*, 300 Ill. 119.

ARGUMENT.

I.

It is our contention under the evidence in this record, *firstly*, that inasmuch as the respondent was engaged in oiling a motor at the time he was injured, which motor was about to be used in the process of lifting coal from a bin to a chute, that such employe was not at said time engaged in interstate commerce, or in such work so closely related to it as to be practically a part thereof.

There is no dispute in the evidence that at the time of the injury, no coal had yet been lifted by the respondent from the ground to the chute. Respondent had started the motor and was endeavoring to oil the gears underneath the fixture when he was injured. (Rec. 22.)

Secondly, there is no evidence in the record as to how long the coal in question had been standing in the bin, before respondent started his motor in question in order to lift the same to the chute. For aught that appears from the record the coal may have been there for days, weeks or months.

In that connection the authorities cited by us under Points I and I are directly in point.

C. B. & Q. R. R. Co. v. *Harrington*, 241 U. S. 177.

In *Erie R. R. Co.* v. *Collins*, 259 Fed. 172, at page 175, the Court says:

> "Coal 'ceases to be in such (interstate) commerce when it reaches its destination, and is left on the stor-

age tracks for some time, as in the Harrington case.' (*Harrington* v. *C. B. & Q.*, 241 U. S. 177). 'Then the coal being out of interstate commerce does not again get into interstate commerce by the mere act of being moved from the storage tracks to another place on the tracks in front of the coal chutes. That was the act Harrington performed."

Again, in *Minneapolis and St. L. R. R. Co.* v. *Winters*, 242 U. S. 353, 356, the Court says:

"An engine as such is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. * * * It simply had finished some interstate work and had not yet begun upon any other. Its next work, so far as appears, might be interstate, or confined to Iowa, as it should happen. At the moment, it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities, or upon accidental later events."

A full exposition of the law, setting forth the distinction between such work as might be held closely connected with interstate commerce, and such as might not, is set forth in *Shanks* v. *Delaware R. R. Co.*, 239 U. S. 556.

In that case a workman engaged in repairing or altering the location of a fixture in a machine shop, was injured. Says the Court at page 258 of the opinion:

"The connection between the fixture and interstate transportation was remote, at best, for the only function of the fixture was to communicate power to ma-

chinery used in repairing parts of engines some of which were used in such transportation."

See also:

Delaware R. R. Co. v. *Yurkonis,* 238 U. S. 439, and

Kelly v. *Pennsylvania R. R. Co.,* 238 Fed. 95.

II.

It appears from the testimony of Lottinville, a witness for respondent Railroad Company, that there was only one engine in the roundhouse on the day that Thomas was injured, and that it was a "dead" engine; that it had just laid off and was doing nothing. (Rec. 47.)

Thomas says that at the time he got hurt, he was getting ready to hoist coal from a storage bin down on the ground up into the chute. (Rec. 22.) No witness disputes that and no witness points out or can point out that that particular coal was later put into an engine that still later might or might not be engaged in interstate commerce. That is the state of the record and upon which opposing counsel say there cannot be the slightest question but that claimant was engaged in interstate commerce at the time he sustained his injury.

We believe the true rule to be deduced from the authorities, including the cases cited by opposing counsel, to be that to bring the employe within the interstate commerce rule, the employe at the time of the injury must have been actually engaged in furthering the work of the railroad along the interstate highway, or in work so closely connected therewith as to be practically a part thereof. Under the facts of this record, it appears to us, that that situation does not apply in the case at bar.